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Supreme Court, U.S.
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No. 00-1742

In The

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*

The Cornell Death Penalty Project (the Project) is an undertaking of the Cornell Law School.[1] The Project conducts empirical analyses of juror decision making in capital cases as a participant in the multi-state Capital Jury Project (the CJP).[2] The Project is responsible for the CJP's efforts in South Carolina. Empirical analyses based on CJP data have been published in a number of articles.[3]

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[1] Pursuant to Supreme Court Rule 37.6 *amicus curiae* states that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

[2] For a description of the CJP and its methodology, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

[3] Quantitative analyses of CJP data to date can be found in John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397 (2001) (South Carolina data); Bowers, *supra* note 2; William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001) (multistate data); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (multistate data); William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1998) (multistate data); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) (South Carolina data); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371 (2001) (South Carolina data); Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277 (2001); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996) (South Carolina data); Theodore

The Project seeks to intervene as *amicus curiae* in cases in which empirical research exists that might facilitate the resolution of the questions presented.

Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (South Carolina data); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) (South Carolina data) [hereinafter Garvey, *Aggravation and Mitigation*]; Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (North Carolina data); Marla Sandys, *Cross-Overs – Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995) (Kentucky data); Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461 (1999); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) (California data); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (California data). Qualitative analyses of CJP data to date can be found in Joseph L. Hoffmann, *Where's The Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995) (Indiana data); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995) (Georgia data).

REASONS FOR GRANTING THE WRIT

I.

BUT FOR TRIAL COUNSEL'S DEFICIENT PERFORMANCE, PETITIONER WOULD LIKELY HAVE BEEN SENTENCED TO LIFE IMPRISONMENT INSTEAD OF DEATH.

Petitioner has set forth a variety of reasons why a petition for a writ of *certioriori* should be granted in this case. We limit our discussion here to the following issue, which is relevant to the second question presented in the petition: Would the outcome of the penalty phase have been different if trial counsel had challenged the State's aggravating circumstances and/or presented mitigating evidence? The data we present below provide strong empirical reason to believe that the answer is yes with respect to both aggravation and mitigation.

A. Aggravating Evidence

What did the jury hear? – The jury found three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious, and cruel in that it involved physical abuse beyond that necessary to produce death; and (3) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, a statutorily enumerated felony.

Based solely on the evidence presented at trial, the members of the jury saw before them an alleged drug

dealer who killed another drug dealer (and tried to kill the other drug dealer's girlfriend) in what the prosecutors described as a turf battle. On top of that, petitioner committed the killing with a butcher knife and stabbed the victim "six times in the chest, penetrating his heart four times." *Abdur'Rahman v. Bell*, 226 F.3d 668, 699 (6th Cir. 2000). And on top of that he had been previously convicted of murder. This picture – taken at face value – is hardly one likely to prompt a vote for life.

What should the jury have heard? – According to the defense, however, the jury could have and should have had before it a very different picture. First, the jury should have heard, and but for the deficient performance of defense counsel would have heard, persuasive evidence that petitioner was not and could not have been the actual assailant because not a spot of blood was found on the coat he was wearing at the time of the offense. Instead, the blood splatter evidence indicates that petitioner's co-defendant (Miller), who pled guilty to second degree murder (and avoided the death penalty) in exchange for his testimony against petitioner, alone committed the assault.[4] Second, the jury should have known,

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[4] The evidence supporting this claim is set forth in the unrebutted expert testimony of Dr. Kris Sperry, a forensic pathologist, presented at the district court hearing in this habeas proceeding. *See* Dist. Ct. Tr. at 10 – 82. Even if this evidence had not been sufficient to fully persuade the jury that the co-defendant committed the offense, it may well have permitted petitioner to avoid the death penalty. This is because evidence of lingering or residual doubt is among the most powerful mitigating evidence available. *See* Garvey, *Aggravation and Mitigation*, *supra* note 3, at 1563-64.

and but for the deficient performance of defense counsel would have known, that petitioner's prior conviction for murder was based on the killing of a prison inmate committed out of fear that the victim was about to rape him. Indeed, petitioner had already been the victim of a series of such assaults.

What difference would it have made? – The results presented in Table 1 confirm what common sense suggests. Leaving the State's case in aggravation unchallenged presented a strong case in favor of death. The data are based on interviews with over 1,000 capital jurors from several different states. Jurors were asked how they thought a particular aggravating or mitigating fact or circumstance would affect their decision: Would it make them more or less likely to vote for death, or would it leave them just about the same? We present here only the results relevant to the case at hand.

The figures in Table 1 suggest that capital jurors who know only that the defendant has a history of violence or who believe the killing was especially brutal – which is all that the jurors in this case knew or believed – are apt to treat those facts as highly aggravating. Most jurors say those facts did or would make them more likely to vote for death.

Table 1
Likely Impact of Uncontested Statutory Aggravating Circumstances (i)(2) and (i)(5)

"Did or would this factor make you . . . likely to vote for death?"				
	More	Same	Less	*n*
Defendant had a history of violent crime (analogous to statutory aggravating circumstance (i)(2))	65%	31%	4%	1017
Killing was brutal, involving torture or physical abuse (analogous to statutory aggravating circumstance (i)(5))	82%	16%	2%	1017

Source — Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1575–76 tbl.10 (1998).

It only stands to reason that if the jury in this case had been told that the defendant's prior crime of violence was committed in the honest belief that it was necessary to protect himself against an assault, and that the brutal killing in the instant case was in fact committed by someone else, the State's case in aggravation would have been considerably weaker than it was. It appeared as strong as it did only because the defendant's trial counsel didn't do his job.

B. Mitigating Evidence

What did the jury hear? – The answer to that question is easy: almost nothing.[5] As the District Court wrote, "No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty." *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1101 (M.D. Tenn. 1998).

What should the jury have heard? – They should have heard a lot more than they did. The evidence available in

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[5] Moreover, the meager mitigating evidence that was presented was filtered through an instruction that, according to expert testimony presented in the District Court (*see* Dist. Ct. Exh. 153), would more likely than not have led several members of the jury to believe – contrary to longstanding Eighth Amendment law – that they could not consider even that evidence unless all the other members of the jury agreed on its existence. The expert findings presented to the District Court are fully consistent with Capital Jury Project research. *See, e.g.*, James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1165-66 tbl.1 (1995) (North Carolina jurors).

mitigation – described in considerable detail in Judge Campbell's opinion in the District Court, as well as in Judge Cole's dissenting opinion in the Court of Appeals – included two kinds of mitigating evidence about which the CJP gathered data: child abuse and mental illness. Accordingly, we focus our discussion here on the effect these two mitigators would likely have had on the jurors in petitioner's case – if only they had had a chance to hear it.

Petitioner's social history paints a vivid picture of the most extreme forms of childhood physical and emotional abuse.[6] Petitioner's father would strike petitioner's penis with a baseball bat; he would put petitioner in a closet "hogtied" and naked and would then leave him there for hours on end; he would beat petitioner with a military strap until petitioner could no longer move; he would force petitioner to eat his own vomit; and on and on.

If petitioner's father was a sadist and alcoholic, his mother was utterly incapable of forming a normal maternal bond with her children. She stopped petitioner from playing with friends; refused to let him take part in school activities; and never bothered to tend to the injuries he would suffer from the beatings her husband would regularly administer. Petitioner had no safe haven. He could only run away and hide in the woods, or else retreat inside, mentally and emotionally checking out and shutting down.

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[6] *See* Dist. Ct. Exh. 141 (social history); Dist. Ct. Tr. at 613 – 63 (testimony of Dr. Diana McCoy).

According to Dr. Diana McCoy, a psychologist and mitigation expert who testified in the district court hearing:

> In my opinion in the 20 or so [capital] cases I have done, it is one of the most compelling social histories that I have encountered and one of the saddest stories, and I think one of the most graphic in explaining this individual's development and behavior that I have encountered.[7]

Dr. Raymond Winbush said this:

> [Petitioner's cases] is singularly the worst case of abuse I have come across in 25 years being an academic psychologist.[8]

The abuse petitioner suffered as a child had predictable consequences. According to the psychiatric testimony introduced in the District Court, petitioner suffers from not one but three distinct disorders: post-traumatic stress disorder, borderline personality disorder, and dissociative disorder.[9] These disorders in turn have predictable behavioral manifestations. Petitioner suffers from delusional thinking; he is emotionally unstable; he labors under a deep and debilitating need to feel as if he belongs; he is especially vulnerable to the influence and depredations of others; and under conditions of extreme

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[7] Dist. Ct. Tr. at 663.

[8] Dist. Ct. Tr. at 1315.

[9] *See* Dist. Ct. Tr. at 439 – 601, 613 – 63, and 1307 – 42 (testimony of Drs. Sadoff, McCoy, and Winbush).

stress he breaks away from reality altogether.[10] The jury knew none of this.

What difference would it have made? – Table 2 shows that this kind of mitigating evidence can make a big difference. Sixty-seven percent of the jurors interviewed assigned mitigating weight to the fact that the defendant had a history of mental illness, and forty-three percent assigned mitigating weight to the fact that the defendant had been seriously abused as a child. Consequently, the outcome of petitioner's penalty phase hearing might very well have been different if petitioner's trial lawyer had presented evidence of this kind, as he could and should have done.

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[10] *See* Dist. Ct. Exh. 141 (social history).

Table 2

Likely Impact of Mitigating Circumstances Trial Counsel Failed to Present

"Did or would this factor make you . . . likely to vote for death?"				
	More	Same	Less	*n*
Defendant had a history of mental illness	3%	30%	67%	1017
Defendant had been seriously abused as a child	1%	56%	43%	1017

Source — Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1575–76 tbl.10 (1998).

How could the Court of Appeals have cast aside this evidence as unimportant? In her concurring opinion in the Court of Appeals, Judge Batchelder agreed with the view expressed by the state post-conviction court to the effect that the aggravating evidence presented at petitioner's trial was so powerful that the mitigating evidence which should have been presented (but wasn't) would have made no difference to the outcome. *Abdur'Rahman*, 226 F.3d at 719 (Batchelder, J., concurring). Table 3 examines this claim and casts considerable doubt on it.

Table 3 looks at two groups of jurors. Panel A looks at jurors who actually sat on cases in which the defendant had a history of violent crime. Panel B looks at jurors who actually sat on cases in which the killing was brutal, involving torture or physical abuse. Do jurors within these two groups continue to assign mitigating weight to the kind of evidence that should have been presented in petitioner's case?

Yes. By and large the fact that the case involved the same kind of aggravating evidence the State presented in petitioner's case does little, if anything, to reduce the impact of the mitigation evidence – even if the State's case in aggravation has gone unchallenged and unrebutted (which of course it shouldn't have in this case). The evidence that should have been presented in mitigation would have remained mitigating in the minds of many jurors, if not most of them, despite the evidence presented in aggravation.

Table 3

A

Likely Impact of Mitigating Circumstances Trial Counsel Failed to Present — Impact Among Jurors Who Sat on Cases in which the Defendant had a History of Violent Crime

"Did or would this factor make you . . . likely to vote for death?"				
	More	Same	Less	*n*
Defendant had a history of mental illness	4%	34%	63%	56
Defendant had been seriously abused as a child	2%	55%	43%	56

B

Likely Impact of Mitigating Circumstances Trial Counsel Failed to Present — Impact Among Jurors Who Sat on Cases in which the Killing was Brutal, Involving Torture or Physical Abuse

"Did or would this factor make you . . . likely to vote for death?"				
	More	Same	Less	*n*
Defendant had a history of mental illness	5%	35%	61%	112
Defendant had been seriously abused as a child	3%	65%	32%	115

Source — Data gathered from 187 jurors who sat on one of 53 capital cases tried in South Carolina between 1986 and 1997.

The point *amicus* wishes to make is simple. First, because the defendant's trial counsel failed to do his job, the State was able to present a powerful case in aggravation. That case would have been substantially weaker if the defendant's lawyer had given the jury the full story. Second, because the defendant's trial counsel failed to do his job, the jury heard almost nothing in mitigation. But a strong case in mitigation could and should have been made and almost certainly would have affected several jurors' thinking about the case. Thus, if trial counsel had done his job the State's case in aggravation would have been significantly weaker and the petitioner's case in mitigation would have been significantly stronger.

The test for prejudice under *Strickland* is whether a "reasonable probability" exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Moreover, as the District Court recognized (but the Court of Appeals did not), a death sentence cannot be imposed under Tennessee law unless *all* the jurors agree that death is the appropriate punishment. If the jury is not unanimous in favor of death, a sentence of life imprisonment is imposed as a matter of law. *See Abdur'Rahman*, 999 F. Supp. at 1101 (*citing* Tenn. Code Ann. § 39-2-203). The result in this case would therefore have been different – it would have been life instead of death – if one juror and one juror alone had come to the conclusion that death was unwarranted.

Based on the empirical evidence presented above, more than a "reasonable probability" exists that at least

one juror would – "but for counsel's unprofessional errors" – have reached that conclusion. *Amicus* respectfully submits that the majority below was wrong and Judges Campbell and Cole were right: But for defense counsel's deficient performance the outcome of petitioner's penalty phase hearing would likely have been different. Petitioner would likely have been sentenced to life imprisonment, not death. Accordingly, the Court should grant the writ in order to resolve the conflicts of law that are detailed in petitioner's application and that led the majority below to reach the opposite conclusion.

CONCLUSION

For the reasons set forth above, together with the reasons set forth in petitioner's submission, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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